# Shahizul Helmi bin Sharani @ Rohan v Angkatan Tentera Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-21NCVC-21–03 OF 2016
ABU BAKAR JAIS J
24 NOVEMBER 2016

*Civil Procedure — Mode of commencement — Action against public authority — Plaintiff brought action by way of writ of summons against defendants for wrongful dismissal — Defendants applied to strike out plaintiff's writ of summons and statement of claim under O 18 r 19(1)(b) or (d) of the Rules of Court 2012 ('the ROC') on ground that mode of action taken by plaintiff was wrong in law — Whether elements of private law outweighed elements of public law — Whether plaintiff should file for judicial review pursuant to O 53 of the ROC — Rules of Court 2012 O 18 r 19 & O 53*

The plaintiff was a public officer with the designation of a corporal in 165 Batalion Risik Tentera Darat whereas the defendants were the public authorities. The plaintiff had commenced an action against the defendants by way of writ of summons for wrongful dismissals by the defendants. The plaintiff had challenged the defendants' decision based on his right of hearing and art 5(1) of the Federal Constitution ('the Constitution') which provided that he shall not be deprived of his life or personal liberty saves in accordance with law. The plaintiff contended that his private law under the Constitution was more substantial in issue than the public law issue of dismissal from the defendants' government service. Further, under the Constitution, an individual has certain fundamental rights upon which not even the power of the State may encroach. The plaintiff also argued that his case should not be struck out unless it was plain and obvious case for striking out. In the present action, the defendants applied to struck out the plaintiff's writ of summons and statement of claim pursuant O 18 r 19(1)(b) or (d) of the Rules of Court 2012 ('the ROC') on the sole ground that the mode of action taken by the plaintiff was wrong in law as it was an abuse of process of the court. The defendants submitted that the plaintiff's conduct of commencing the action via writ of summons was an attempt to avoid the conditions imposed under O 53 of the ROC and the plaintiff should have commenced the action by way of judicial review as provided under the said provision.

**Held**, allowing the defendants' application with costs:

(1) The case of the plaintiff predominantly involved more public law than private law as the defendants acted in their public capacity to dismiss the

plaintiff. The issue on the plaintiff's right of hearing also involved a right that should or should not be given in his capacity as someone in the employment of public office. This showed that the element of public law was more dominant than private law. The plaintiff must show that private law dominated his case more than public law issues in order to file writ of summons. In conclusion, the mode of proceedings chosen by the plaintiff by filing the writ of summons and not judicial review pursuant to O 53 of the ROC was wrong and improper and as such, this was a basis to struck out the plaintiff's writ of summons and statement of claim (see paras 27, 30, 34 & 37).

**[Bahasa Malaysia summary**

Plaintif adalah pegawai awam berjawatan korporal di dalam 165 Batalion Risik Tentera Darat sementara defendan-defendan adalah pihak berkuasa. Plaintif telah memulakan tindakan terhadap defendan-defendan melalui writ saman untuk pembuangan kerja salah oleh defendan-defendan. Plaintif telah mencabar keputusan defendan-defendan berdasarkan hak untuk pendengaran dan perkara 5(1) Perlembagaan Persekutuan ('Perlembagaan') yang memperuntukkan bahawa dia tidak akan dinafikan nyawanya atau kebebasan peribadi kecuali mengikut undang-undang. Plaintif berhujah bahawa isu undang-undang peribadinya di bawah Perlembagaan adalah lebih substansial daripada isu undang-undang awam terhadap pembuangan kerja daripada perkhidmatan kerajaan. Selanjutnya, di bawah Perlembagaan, seseorang individu mempunyai hak asasi tertentu di mana kuasa Kerajaan Negeri tidak dapat menceroboh. Plaintif juga berhujah bahawa kes ini tidak patut dibatalkan kecuali ia adalah kes yang biasa dan jelas untuk dibatalkan. Dalam tindakan ini, defendan-defendan memohon untuk membatalkan writ saman dan pernyataan tuntutan plaintif berikutan A 18 k 19(1)(b) atau (d) Kaedah-Kaedah Mahkamah 2012 ('KKM') atas satu-satunya alasan bahawa cara tindakan diambil oleh plaintif adalah salah di sisi undang-undang kerana ia adalah penyalahgunaaan proses mahkamah. Defendan-defendan berhujah bahawa tingkah laku plaintif memulakan tindakan melalui writ saman adalah percubaaan untuk tidak mematuhi syarat-syarat yang dikenakan di bawah A 53 KKM dan plaintif patut memulakan tindakan melalui semakan kehakiman seperti yang diperuntukkan di bawah peruntukan tersebut.

**Diputuskan**, membenarkan permohonan defendan-defendan dengan kos:

(1) Kes plaintif sebahagian utamanya melibatkan lebih undang-undang awam daripada undang-undang persendirian kerana defendan-defendan bertindak dalam kapasiti awam mereka untuk menamatkan perkhidmatan plaintif. Isu ke atas hak plaintif terhadap pendengaran juga melibatkan hak yang sama ada patut atau tidak diberikan dalam kapasitinya sebagai seseorang yang berkerja dengan pejabat awam. Ini menunjukkan bahawa unsur undang-undang awam adalah lebih

dominan daripada undang-undang persendirian. Plaintif juga mesti menunjukkan bahawa undang-undang persendirian menguasai kesnya lebih daripada isu-isu undang-undang awam supaya dapat memfailkan writ saman. Kesimpulannya, cara prosiding yang dipilih oleh plaintif dengan memfailkan writ saman dan bukan semakan kehakiman berikutan A 53 KKM adalah salah dan tidak betul dan oleh sedemikian, ini adalah asas untuk membatalkan writ saman dan pernyataan tuntutan plaintif (lihat perenggan 27, 30, 34 & 37).]

**Notes**

For cases on action against public authority, see 2(3) *Mallal's Digest* (5th Ed, 2015) at paras 6227–6228.

**Cases referred to**

*Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145, FC (refd)

*Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, FC (refd)

*Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389, FC (refd)

*O'Reilly v Mackman and others and other cases* [1982] 3 All ER 1124, HL (refd)

*Racha ak Urud @ Peter Racha Urud & Ors v Ravenscourt Sdn Bhd & Ors* [2014] 3 MLJ 661, CA (refd)

*Superintendent of Lands and Surveys, Samarahan Division & Anor v Abas ak Naun & 5 Ors and another appeal* [2015] 6 MLJ 788, FC (refd)

*Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261, CA (refd)

*Yahya bin Kassim v Government of Malaysia & Anor* [1997] 3 MLJ 749, CA (refd)

**Legislation referred to**

Army and Air Force (Terms of Service) Regulations 1961 r 49(j)
Courts of Judicature Act 1964 Schedule, para 1
Federal Constitution art 5(1)
Public Officers (Conduct and Discipline) Regulations 1993
Rules of Court 2012 O 18 rr 19(1)(b), (1)(d), O 53, O 53 rr 1(1), 2(4), 3(1), (6)

*Alif Bolkin (Karpal Singh & Co) for the plaintiff.*
*Krishna Priya (Federal Counsel, Attorney General's Chambers) for the defendants.*

**Abu Bakar Jais J:**

INTRODUCTION

**[1]** This is the defendants' application to strike out the plaintiff's writ of summons and statement of claim under O 18 r 19(1)(b) or (d) of the Rules of Court 2012 ('the ROC') on the ground that the plaintiff had employed a wrong mode of proceeding to challenge the decision of the defendants.

**[2]** The basis of this application is that the plaintiff's action is an abuse of court process because this action was commenced by writ of summons, instead of by way of judicial review under O 53 of the ROC.

BACKGROUND FACTS

**[3]** In this action by the plaintiff, a challenge is made against the decision of the first and second defendants in dismissing the plaintiff from the Malaysian Armed Forces Service with the designation as a corporal in 165 Batalion Risik Tentera Darat.

**[4]** The plaintiff's statement of claim is four pages. He contended that his dismissal are void and unlawful. He states he was informed vide a letter that he was dismissed pursuant to 'Rule 49(j) the Army and Air Force (Terms of Service) Regulations 1961'. He also states in the statement of claim that he was deprived the right of hearing before dismissal.

**[5]** He prays for among others, a declaration that his dismissal is void, unlawful and of no effect.

THE DEFENDANTS' CONTENTION

**[6]** The defendants' sole ground for the application is that the mode of action taken by the plaintiff is wrong in law as it is an abuse of process of the court. Here, the plaintiff's conduct of commencing this action by way of writ of summons is an attempt to avoid the conditions imposed under O 53 of the ROC. The defendant contended that the plaintiff should have taken this action by filing an application for judicial review as provided for under O 53 of the ROC.

THE PLAINTIFF'S CONTENTION

**[7]** The plaintiff argued that the House of Lords in *O'Reilly v Mackman and others and other cases* [1982] 3 All ER 1124 decided that a writ can be issued and not judicial review if the case involves private law and the challenge on the

validity of the decision of a public body only arises as a collateral issue. Meaning private law outweighs the consideration of public law. And here the plaintiff says his case is more on his rights in private law than in public law as the latter arose only ancillary to the former.

**[8]** The plaintiff contended the same is found by the Federal Court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 where it was decided to look for issues which are more dominant between public law and private law. If the case is more of a private law claim more than the issue affecting public law, then the plaintiff can take action through a wit of summons and not judicial review pursuant to O 53 of the ROC.

**[9]** As the plaintiff's claim is premised on his wrongful dismissal by the defendants, the plaintiff had challenged the defendants' decision based on his right of hearing and art 5(1) of the Federal Constitution provides that he shall not be deprived of his life or personal liberty save in accordance with law. In this regard the Court of Appeal's case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 was cited to say that the word 'life' in that article of the Federal Constitution includes the right to seek and be engaged in gainful employment and to receive appropriate benefits.

**[10]** Therefore the plaintiff submitted that his private law right under the Federal Constitution is more substantial in issue that the public law issue of dismissal from the defendants' government service.

**[11]** The plaintiff further submitted the case of *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 basically to say that under the Federal Constitution an individual has certain fundamental rights upon which not even the power of the state may encroach.

**[12]** Also citing *Racha ak Urud @ Peter Racha Urud & Ors v Ravenscourt Sdn Bhd & Ors* [2014] 3 MLJ 661 and *Superintendent of Lands and Surveys, Samarahan Division & Anor v Abas ak Naun & 5 Ors and another appeal* [2015] 6 MLJ 788 the plaintiff argued his case should not be struck out unless it is plain and obvious case for striking out. This is more so as his claim involved constitutional rights.

## THE COURT'S FINDINGS

### *The provision*

**[13]** First to be noted is that whether any case should be filed for judicial review under O 53 of the ROC or by way of the normal writ of summons

depends on the facts of each particular case as decided by the Federal Court in the case of *Ahmad Jefri bin Mohd Jahri*, a case mentioned earlier. A

**[14]** Second, O 53 r 1(1) of the ROC states:

> This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified. B

**[15]** While para 1 of the Schedule to the Courts of Judicature Act 1964 states: C

> Prerogative Writs
>
> Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, *or any others,* for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose. (Emphasis added.) D

**[16]** The words 'or any others' above are wide enough to include prayers like declaration to the effect the dismissal of a government servant such as the plaintiff is void, unlawful and of no effect. This prayer in fact as pointed out earlier, was asked by the plaintiff. In fact to those who are familiar, this kind of prayer is common in dismissal cases involving public authorities. E

**[17]** In fact O 53 r 2(2) states: F

> An application for judicial review may seek any of the reliefs, including *a prayer for a declaration*, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter. (Emphasis added.)

**[18]** Since O 53 r 1(1) of the ROC states that this order shall govern all applications seeking such relief, it is incumbent for the plaintiff to file application for judicial review pursuant to this provision. He cannot file a writ of summons. I say the plaintiff must commence action pursuant to O 53 of the ROC because the public law element in his case is more than the private law element as will be explained in a short while. G H

**[19]** More so when we consider O 53 r 2(4) of the ROC that reads:

> Any person who is adversely affected by the decision of any public authority shall be entitled to make the application. I

**[20]** In fact in *O'Reilly*, the case mentioned earlier, the House of Lords decided that O 53 of the Supreme Court Rules which is for all intents and purposes equivalent to our O 53 of the ROC, should be used instead of the

normal writ. The issue before the House of Lords then is whether it is an abuse of the process of the court for the plaintiffs to commence a writ action to challenge a decision of a public authority, instead of proceeding by way of judicial review. The relevant part of the headnote reads:

> Held, dismissing the appeals, that since all the remedies for the infringement of rights protected by public law could be obtained on application for judicial review, as general rule it would be contrary to public policy and an abuse of the process of the court for the plaintiff complaining of a public authority's infringement of his public law rights to seek redress by ordinary action and that, accordingly, since in each case the only claim made by the plaintiff was a declaration that the board of visitors adjudication against the plaintiff was void, it would be an abuse of the process of the court to allow the actions to proceed and thereby avoid the protection afforded to statutory tribunals.

**[21]** In the case of *Yahya bin Kassim v Government of Malaysia & Anor* [1997] 3 MLJ 749, the appellant filed a writ for declaration that the decision of the disciplinary body for a reduction in rank is invalid. Dismissing the appeal, Mahadev Shanker JCA held at p 752:

> It was an abuse of the process on the part of appellant to resort to action for declaration in order to evade the clear requirements of O 53 r 1A of the RHC 1980.

**[22]** Similarly the plaintiff's claim now against the defendants are public law matters and must be made under O 53 of the ROC. It is an abuse of the process of the court for the plaintiff to circumvent the requirements stipulated under this provision.

**[23]** In this regard there are reasons to state as in *O'Reilley* that there are some protections afforded to public authorities before anyone could challenge its decisions in judicial review. And this protection as mentioned, is provided through the conditions that are imposed in O 53 of the ROC itself such as O 53 r 3(6) of the ROC which states:

> An application for judicial review shall be made promptly and in *any event within three months* from the date when the grounds of application first arose or when the decision is first communicated to the applicant. (Emphasis added.)

**[24]** As seen, the above provision requires the challenge to be made within three months by an applicant for judicial review. This may be a daunting condition to those who sit on their right in taking action to mount a challenge against the decisions of public authorities. A delay will mean their right for judicial review might greatly be affected. In order to overcome this condition, this is where many instead of applying for judicial review, had filed the normal writ of summons.

**[25]** Another stringent requirement is to obtain leave prior to the application for actual judicial review as noted by O 53 r 3(1) of the ROC that states:

> An application under this Order shall not be made unless leave therefor has been granted in accordance with this rule.

**[26]** And here is where the courts ought to be vigilant in monitoring whether the writ is filed to defeat such requirements laid down under O 53 of the ROC. For this reason the action of the plaintiff in filing the writ of summons and not judicial review under the said provision, must be given greater scrutiny.

**[27]** In addition, as pointed out by the Federal Court in *Ahmad Jeffri bin Mohd Jahri* this is not a negligence case where obviously the element of private law will be more substantial than public law as in the case of *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389. Likewise the case of the plaintiff now also does not involve private law more than public law as in negligence cases. On the contrary, the case of the plaintiff predominantly involves more public law than private law as the defendants acted in their public capacity to dismiss the plaintiff. The plaintiff in turn is undisputed to be in the employment of a public body.

*The plaintiff's arguments*

**[28]** I shall now deal with each argument of the plaintiff in objecting to the defendants' application starting at p 2 of the former written submission, lest I be accused of not addressing every contention of the same in arriving at the decision of this court.

**[29]** First is the contention of the plaintiff that writ of summons can be issued in respect of his case as it involves more of private law and the challenge on the validity of the decision of a public body only arises as a collateral issue. Meaning private law outweighs the consideration of public law in his case.

**[30]** I respectfully do not think that his case involves more private law than public law. The plaintiff's challenge on the dismissal involves the defendants who are public authorities. The issue on his right of hearing also involves a right that should or should not be given in his capacity as someone in the employment of public office. It also involves a right that implicates the defendants as public authorities. This indicates that the element of public law is more dominant than private law. On top of this, as narrated earlier, the plaintiff himself in his statement of claim states he was informed vide a letter that he was dismissed pursuant to 'Rule 49(j) the Army and Air Force (Terms of Service) Regulations 1961'. This is statutory law as also found similarly in *Ahmad Jeffri bin Mohd Jahri* when it dealt with the relevant regulations in that

case. Obviously these regulations govern and affect public servants in the army, another element of public law. And although the present case may seem a dismissal of an employee by an employer to connote simple application of private law, the regulations underpinned the public law element in this case just as decided by the Federal Court in *Ahmad Jeffri bin Mohd Jahri* where the relevant statutory law in that case was the Public Officers (Conduct and Discipline) Regulations 1993.

**[31]** The plaintiff's also argued on his right of hearing and art 5(1) of the Federal Constitution provides that he shall not be deprived of his life or personal liberty save in accordance with law. In this regard he argued the Court of Appeal's case of *Tan Tek Seng* had decided that the word 'life' in that article of the Federal Constitution includes the right to seek and be engaged in gainful employment and to receive appropriate benefits.

**[32]** Therefore the plaintiff submitted that his private law right under the Federal Constitution is more substantial in issue than the public law issue of dismissal from the defendants' government service.

**[33]** On this argument, no doubt his right under the Federal Constitution is being raised including his right to seek livelihood and gainful employment. But here the plaintiff conveniently avoided to mention that he had seek employment in a public body and are bound by the rules and procedure that are publicly enacted and formed to apply to all government servant. The element of public law in this sense still outweighs his right under private law. The former is not merely a collateral matter that crops up in the plaintiff's request for reliefs. It is on the contrary the core issue.

**[34]** On the argument of the plaintiff regarding the case of *Loh Kooi Choon* to say that under the Federal Constitution an individual has certain fundamental rights upon which not even the power of the state may encroach, I find no reasons to doubt the propriety and accuracy of that proposition. However this does not assist the plaintiff as the fact remains he must show that private law dominates his case more than public law issues in order to file the writ of summons. And in this regard, based on the reasons as narrated earlier, I find that the converse is true. Therefore it was wrong for the plaintiff to file the writ of summons and not to file for judicial review pursuant to O 53 of the ROC.

**[35]** Also as narrated earlier, the plaintiff had cited the case *Racha ak Urud* and *Superintendent of Lands and Surveys* to argue his case should not be struck out unless it is plain and obvious case for striking out. This is more so as his claim involved constitutional rights.

**[36]** On this submission, I say the plaintiff's case might well involve constitutional rights but as decided by the case law that have been alluded, that is not the criteria to determine whether he can file the writ of summons or he needs to follow O 53 of the ROC. The criteria is still to see whether public law issue is merely accidental to the whole case while private law consideration dominates the trial and outcome of the case. I have already explained my reasons why I am of the view that in this case public law considerations and issues far outweigh private law matters and in this regard public law is not merely an ancillary matter in the factual matrix of this case.

CONCLUSION

**[37]** Based on the reasons that are highlighted aforesaid, I find that the mode of proceeding chosen by the plaintiff by filing the writ of summons and not judicial review pursuant to O 53 of the ROC is wrong and improper. I agree this is a basis to strike out the writ of summons and statement of claim of the plaintiff. Therefore the application of the defendants is allowed accordingly with costs.

*Defendants' application allowed with costs.*

Reported by Dzulqarnain Ab Fatar